In the
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SORENSON COMMUNICATIONS, INC.,	)	
	)	
Petitioner	)	
	)	
v.	)	**Nos. 08-9503**
	)	**08-9507**
FEDERAL COMMUNICATIONS COMMISSION	)	**08-9545**
and UNITED STATES OF AMERICA,	)	
	)	
Respondents	)	

OPPOSITION OF FEDERAL COMMUNICATIONS COMMISSION TO PETITIONER'S MOTION FOR STAY PENDING JUDICIAL REVIEW

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INTRODUCTION

Respondent Federal Communications Commission hereby opposes petitioner Sorenson's motion for stay pending judicial review. Sorenson asks for a stay of Commission declaratory rulings intended to limit the use of consumer information that Sorenson and other companies obtain solely because of their participation in a federal program that provides telecommunications services for persons with hearing and speech disabilities, as well as the use of federal money they receive in order to provide such services. Sorenson's motion establishes none of the factors warranting a stay. In particular, Sorenson fails to demonstrate that the First Amendment is even implicated by this case, a failing that defeats its claims to both a likelihood of success on the merits and irreparable harm. The restrictions at issue do not limit Sorenson's speech but instead impose reasonable restrictions on those, like Sorenson, that choose to participate in a federal program to ensure that they do not misuse the information they obtain through participation in that program or use the program's funds for a purpose – lobbying – clearly outside its scope.

BACKGROUND

These consolidated petitions seek review of two *Declaratory Rulings* of the FCC concerned with Telecommunications Relay Services ("TRS"). *Telecommunications Relay Services*, 22 FCC Rcd 20140 (2007) and *Telecommunications Relay Services*, 23 FCC Rcd 8993 (2008). TRS, mandated by Title IV of the Americans with Disabilities Act of 1990,[1] enables an individual with a hearing or speech

[1] Pub. L. No. 101-336, § 401, 104 Stat. 327, 336-69 (1990), adding Section 225 to the Communications Act, 47 U.S.C. § 225.

disability to communicate by telephone with a person without such a disability. This is accomplished through TRS facilities that are staffed by individuals who relay conversations between disabled persons using various types of assistive communication devices and persons using a standard telephone.

Traditionally, TRS calls have been text-based: the TRS provider serves as the link in the conversation, converting text messages from the caller into voice messages, and voice messages from the called party into text messages for the user. Video Relay Service ("VRS") is a newer form of TRS that allows people with hearing and speech disabilities to communicate through sign language using video equipment rather than typed text.

The provision of TRS is "an accommodation that is required of telecommunications providers, just as other accommodations for persons with disabilities are required by the ADA of businesses and local and state governments."[2] To this end, Section 225 is intended to ensure that TRS "give[s] persons with hearing or speech disabilities 'functionally equivalent' access to the telephone network."[3] The statute provides that TRS users cannot be required to pay rates "greater than the rates paid for the functionally equivalent voice communications services . . . ." 47 U.S.C. 225(d)(1)(D). The statute and regulations provide that eligible TRS providers offering interstate services and certain intrastate services will be compensated for their reasonable costs of doing so from the Interstate TRS Fund, which is created by

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[2] *Telecommunications Relay Services*, 19 FCC Rcd 12475 at ¶ 182 n.521 (2004) (*2004 TRS Report & Order*).

[3] *Telecommunications Relay Services*, FCC 98-90, 1998 WL 251383 at ¶ 6 (May 20, 1998) (*1998 TRS NPRM*); *see generally* 47 U.S.C. § 225(a)(3).

contributions from common carriers providing interstate telecommunications services.[4] The amount of carriers' contributions and TRS providers' compensation are determined by the FCC. *See, e.g., Telecommunications Relay Services*, 21 FCC Rcd 8379, 8381-84 ¶¶2-6 (2006).

In November 2007 the Commission released the *Report and Order and Declaratory Ruling* that is before the Court in this case, addressing a number of issues relating to the provision of TRS. *Telecommunications Relay Services*, 22 FCC Rcd 20140 (2007)("*2007 R&O and Declaratory Ruling*"). The report and order portion of that action dealt primarily with TRS compensation rates and is not challenged by Sorenson. In the declaratory ruling portion of that order, the Commission sought to clarify existing limitations imposed on TRS providers in two areas – (1) financial and other incentives that providers may offer TRS users consistently with FCC rules, and (2) TRS providers' improper use of consumer call records and databases for purposes outside of the provision of TRS. Sorenson challenges only the second area of the *Declaratory Ruling*.

In two paragraphs, the Commission called to the attention of TRS providers statements it had made in previous orders that "TRS customer profile information cannot be used for any purpose other than handling relay calls" and that "providers also may not use a consumer or call database to contact TRS users for lobbying or any other purpose." *2007 R&O and Declaratory Ruling*, 22 FCC Rcd at 20183 ¶95, *citing Telecommunications Relay Services*, 15 FCC Rcd 5140, 5175 ¶83 (2000) and PUBLIC NOTICE, *TRS Marketing and Call Handling Practices*, 20 FCC Rcd 1471

[4] *See, e.g.*, 47 C.F.R. § 64.604(c)(5)(iii)(E).

(2005). The Commission added that providers found to be "misusing customer information, will be ineligible for compensation from the Fund." *Id.* at ¶96.[5]

In response to Sorenson's motion for agency stay of the *Declaratory Ruling*, the Commission's staff issued an order granting a stay of paragraphs 95 and 96 of the *Declaratory Ruling* in order to give the agency sufficient time to consider Sorenson's arguments.[6]

After considering Sorenson's claims, the Commission issued a ruling clarifying the language contained in paragraphs 95 and 96 of the earlier decision. *Telecommunications Relay Services*, 23 FCC Rcd 8993 (2008)("*2008 Declaratory Ruling*"). The Commission explained first that

> the language in paragraphs 95 and 96 restricting the use of consumer information "for any … purpose," does not prohibit contacts by TRS providers with TRS users that are directly related to the handling of TRS calls. Consistent with the Commission's TRS rules and orders, providers may use information derived from a consumer or call data-base established in conjunction with Section 225 to contact users as long as it is for purposes *related to the handling of relay calls*.

Id. at 8997 ¶9 (footnote omitted). Second, the Commission explained that "providers may not use consumer information obtained through the provision of federally-funded relay services, or use funds obtained from the Interstate TRS Fund, to engage in lobbying or advocacy activities directed at relay users." *Id.* at 8998 ¶10.

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[5] In the course of participating in the TRS program, TRS providers obtain customer or call database information that includes individual TRS users' names, addresses, phone numbers, and other personal information, as well as carrier of choice, speed dial numbers, calling card numbers, special needs information, emergency numbers and technical information to provide TRS service to the user. *See, e.g.*, *Telecommunications Relay Services*, 18 FCC Rcd 12379, 12390 n. 64 (2000).

[6] *Telecommunications Relay Services*, 23 FCC Rcd 1705 (CGB 2008). The stay subsequently was extended for several weeks. *Telecommunications Relay Services*, 23 FCC Rcd 7443 (CGB 2008).

The Commission noted that "[e]vidence in the record shows that at least one service provider has bombarded deaf persons with material seeking to persuade them to support the provider's position on matters pending before the FCC" and found that "using revenue from the TRS Fund, or information obtained from end users in the provision of services supported by the TRS Fund, to engage in that kind of advocacy is inconsistent with the purpose of the TRS Fund." *Id.* (footnote omitted).

The Commission rejected arguments that such restrictions on use of customer information and TRS funds conflict with the First Amendment, noting that in the "context of a federally subsidized program, like the TRS Fund, the government 'may certainly insist that these "public funds be spent for the purposes for which they were authorized."'" *2008 Declaratory Ruling*, 23 FCC Rcd at 8998 at ¶11, *quoting United States v. American Library Ass'n*, 539 U.S. 194, 212 (2003).

"The TRS Fund," the Commission explained, "is designed to ensure that persons with hearing and speech disabilities have access to the telephone system. It was not intended to finance lobbying by TRS providers directed at end users." *Id.* The Commission found that it "is under no obligation 'to fund such activities out of the public fisc'" and that it was appropriate, for the same reasons,

> to restrict the use of customer information acquired in the provision of federally subsidized TRS services. A consumer or call database that a service provider develops and maintains through participation in the TRS program is inextricably tied to that federally funded program. Consequently, it is permissible to prohibit the use of that database for purposes unrelated to the handling of relay calls, such as lobbying end users to support a service provider's position before the Commission.

Id. (footnote omitted), *quoting Rust v. Sullivan*, 500 U.S. 173, 198 (1991).

The Commission emphasized that nothing in its rulings here "would prevent a

provider from using information and funds from other sources to engage in lawful lobbying or advocacy activities. Thus, this is not an 'unconstitutional conditions' case in which the government 'effectively prohibit[ed] the recipient from engaging in the protected conduct outside the scope of the federally funded program.'" *Id.* at ¶12, *quoting Rust v. Sullivan*, 500 U.S. at 197. "TRS providers are," the Commission pointed out, "free to use those resources outside the scope of the TRS program to support their positions before the Commission." *Id.*

ARGUMENT

Before it can obtain a stay of an agency order pending judicial review, a petitioner must show that: (1) it will likely prevail on the merits; (2) it will suffer irreparable harm unless a stay is granted; (3) other interested parties will not be harmed if a stay is granted; and (4) a stay will serve the public interest. *See Pacific Frontier v. Pleasant Grove City*, 414 F.2d 1221, 1231 (10th Cir 2005). To succeed in invoking "the court's extraordinary injunctive powers," a party must, at the very least, demonstrate "either a high probability of success and some injury, or *vice versa*." *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985). Petitioners have failed to justify their stay request under this stringent standard.

A. SORENSON HAS FAILED TO DEMONSTRATE THAT IT IS LIKELY TO PREVAIL ON THE MERITS.

Sorenson presents both statutory and constitutional grounds for its claim that it is likely to prevail on the merits. The Court should find neither persuasive.

1. The Rulings Are Statutorily Permissible And Reasonable.

a. The FCC Acted Within Its Statutory Authority In Adopting The Declaratory Rulings.

Sorenson's contention (Mot. at 16-17) that the Commission has acted outside of its statutory authority in adopting the *Declaratory Rulings'* restrictions on use of TRS customer information and funds is baseless. Congress has conferred on the Commission express authority, indeed the duty, to implement and enforce the provisions of the Communications Act governing TRS. *See*, *e.g.*, 47 U.S.C. § 225(b)(1)("[T]he Commission shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible *and in the most efficient manner*, to hearing-impaired and speech-impaired individuals in the United States." (emphasis added)); § 225(d)(directing FCC to adopt regulations to implement statute's requirements, including "establish[ing] functional requirements, guidelines, and operations procedures for telecommunications relay services").

The Commission's clarifications in the *Declaratory Rulings* were based on its conclusion that reasonable restrictions on the use of customer information and TRS funds received by providers are "necessary to prevent improper marketing practices and to ensure that interstate TRS funds are used for their intended purpose." *2008 Declaratory Ruling*, 23 FCC Rcd at 8996 ¶8. Regulation based on such findings are squarely within the agency's authority to ensure that TRS are made available in "the most efficient manner" (47 U.S.C. § 225(b)(1)) and to "establish functional requirements" and "guidelines" for TRS (47 U.S.C. § 225(d)(1), as well as its general authority under the Communications Act to issue orders the Commission concludes "may be necessary in the execution of its functions" (47 U.S.C. § 154(i); *see Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1404 (D.C. Cir. 1996)). The authority to adopt rules governing TRS surely encompasses the

power to clarify the meaning of the rules and the statute through a declaratory ruling.[7]

b. The FCC Acted Reasonably In Adopting The Declaratory Rulings.

There is no basis for Sorenson's contention that the rulings were arbitrary and capricious. Mot. at 17. The "arbitrary and capricious" standard of review is "narrow," and the Court is not to substitute its judgment for that of the agency. *See Mainstream Marketing Services, Inc. v. FTC*, 358 F.3d 1228, 1248 (10th Cir.). As the expert agency assigned to implement the statute, the Commission explained that the TRS program's purpose is to "ensure that persons with hearing and speech disabilities have access to the telephone system." The statute's purpose is not to facilitate providers' lobbying of such persons or to facilitate communication initiated by a provider for purposes unrelated to the providers' handling of relay calls. As a result, a TRS provider's use of customer information or compensation received from the TRS Fund for such activities is inconsistent with the statute's purpose. *2008 Declaratory Ruling*, 23 FCC Rcd at 8998 ¶¶10-11; see *Albuquerque*

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[7] Sorenson cites inapposite cases illustrating the obvious proposition that there are limits on the FCC's exercise of its authority. *See* Mot. at 17. In *Motion Picture Ass'n of America v. FCC*, 309 F.3d 796 (D.C.Cir. 2002), the court found that where no other provision of the Act authorized the Commission to adopt the rules in question, it could not rely solely on its ancillary authority as a basis to adopt rules. Here the Congress has conferred on the Commission explicit authority to implement TRS (s*ee* 47 USC § 225), and its actions here are directly related to that authority. Similarly, in *American Library Ass'n v. FCC*, 406 F.3d 689 (D.C.Cir. 2005), the court found that the Commission's regulations reached into an area – regulation of consumer electronic devices when those devices are no longer engaged in the process of wire or radio communications – that exceeded the agency's authority. Here, by contrast, the subject of the Commission's restrictions – TRS Fund compensation and customer information derived from the provision of TRS – is directly within the Commission's authority under 47 U.S.C. § 225.

v. Browner, 97 F.3d 415, 421-22 (10th Cir. 1996) (agency construction of statute it administers entitled to deference). Such action falls easily with the agency's discretion under an arbitrary and capricious standard of review.

It is thus difficult to take seriously Sorenson's claim (Mot. at 17) that the Commission's action is not "rationally related to any government interest." Its further assertion that the "FCC has not considered less restrictive alternatives" is irrelevant outside of the First Amendment context since the agency is not obligated to employ a "least restrictive alternatives" approach in adopting regulations. *See Florida Cellular Mobile Comm. Corp. v. FCC*, 28 F.3d 191, 197 (D.C.Cir. 1994).[8]

c. The Declaratory Rulings Are Consistent With APA Procedural Requirements.

Sorenson erroneously claims that the *Declaratory Rulings* "were adopted without the notice and comment that the APA requires." Mot. at 16. In fact, the rulings were an exercise of the Commission's adjudicative authority under Section 5(d) of the APA "to issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e); *see Qwest Services Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007)(declaratory ruling can be form of adjudication under APA). The rulings' purpose was to clarify the limitations on TRS providers' use of customer information derived from the provision of TRS as well as compensation from the TRS Fund. *See 2008 Declaratory Ruling*, 23 FCC Rcd at 8997-99 ¶¶9-14. The decision whether to proceed by rule making or adjudication lies within the agency's discretion. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). This is

[8] As shown below, the restrictions imposed by the *Declaratory Rulings* do not raise First Amendment issues, so there is no basis for a "least restrictive alternatives" analysis in that context either.

true "regardless of whether the decision may affect agency policy and have general prospective application." *Chisholm v. FCC*, 588 F.2d 349, 365 (D.C.Cir. 1976). As adjudicatory orders adopted pursuant to 5 U.S.C. § 554(e), the *Declaratory Rulings* here are not subject to the notice and comment and other requirements of the APA for legislative rules. *See* 5 U.S.C. § 553.

Even if the *Declaratory Rulings* were deemed to be the result of rule making rather than an adjudication, the rulings involve an "interpretative rule" that is not subject to the notice and comment requirement of the APA. 5 U.S.C. § 553(b)(3)(A). *See Lincoln v. Vigil*, 508 U.S. 182, 195 (1993). An interpretative rule is one "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995). In contrast to a legislative rule, in which the agency creates new rights or obligations, an interpretative rule provides "the agency's opinion as to what the governing statute means." *American Trucking Ass'n, Inc. v. United States*, 688 F.2d 1337, 1342 (11th Cir. 1982). Interpretative rules "merely clarify or explain existing law or regulations." *D.H. Blattner & Sons, Inc. v. Secretary of Labor*, 152 F.3d 1102, 1109 (9th Cir. 1998). In this case, the FCC simply clarified its interpretation of Section 225 of the Communications Act as set out in earlier rulings. *See 2007 R&O and Declaratory Ruling*, 22 FCC Rcd at 20180-83 ¶¶89-96; *2008 Declaratory Ruling*, 23 FCC Rcd at 8993-96 ¶¶1-7.

2. Sorenson Has Not Presented A Substantial Constitutional Question Concerning The Commission's Rulings.

Sorenson's claim that it is likely to prevail on the merits because the Commission's rulings restrict speech in violation of the First Amendment and are

unconstitutionally vague is equally unavailing. The core of Sorenson's argument is premised on the mistaken claim that the Commission's action constitutes "new, sweeping, speech restrictions" (Mot. 1) on Sorenson and other TRS providers. In fact, the Commission has imposed no such restrictions. As the Commission correctly concluded, its rulings do not "prevent a provider from using information and funds from other sources to engage in lawful lobbying or advocacy activities," thus distinguishing its action here from "an 'unconstitutional conditions' case in which the government 'effectively prohibit[ed] the recipient from engaging in the protected conduct outside the scope of the federally funded program.'" *2008 Declaratory Ruling*, 23 FCC Rcd at 8998 ¶12, *quoting Rust v. Sullivan*, 500 U.S. at 198. Rather than prohibiting speech, the Commission's rules simply bar misuse of customers' private information and help channel federal funds toward federal goals.

In imposing reasonable limits on participants in a federal program, the Commission correctly relied on *Rust*, in which recipients of federal family planning funds raised a First Amendment challenge to a restriction on their provision of abortion counseling. The Supreme Court rejected that claim, holding that Congress has authority to insist "that public funds be spent for the purposes for which they were authorized." 500 U.S. at 196. The Court further explained that "the recipient is in no way compelled to operate a [federal] project; it can simply decline the subsidy." *Id.* at 199 n.5. That analysis is controlling here; the Commission reasonably concluded that the "TRS Fund is designed to ensure that persons with hearing and speech disabilities have access to the telephone system. It was not intended to finance lobbying by TRS providers directed at end users." *2008 Declaratory Ruling*,

23 FCC Rcd at 8998 ¶11.

Sorenson attempts to distinguish *Rust* on the ground that it "does not shield restrictions where the government funds are payments *for services rendered*, rather than grants of subsidies." Mot. at 9. As an initial matter, even if this distinction were correct, it would provide no support for Sorensen's challenge to the Commission's restriction on its use of customer information it obtains solely through its participation in the TRS program. There is no basis in the case law or in common sense for the suggestion that the government cannot limit what grantees *or* contractors do with citizens' private information they obtain through their work for the government. For example, if the IRS contracted with a company to create an electronic database of tax returns, there is no question that it could prohibit the company from using the information it obtained about taxpayers in performance of that contract to lobby them or for some other purpose outside the scope of the contract. So too here.

Sorenson's claimed distinction fails with respect to use of funds as well. It cites to no discussion of a contractor-grantee dichotomy in *Rust*; instead, the Court there held as a general matter that it was appropriate for the government to prevent private entities' use of the government's programmatic funds on activities "outside the scope of the federally funded program." 500 U.S. at 193. Although the details of each federal program necessarily vary, that general principle is equally applicable here, and the correct answer to the constitutional question does not turn on the details of particular mechanism chosen by the Commission to fund the provision of TRS service.

Contrary to Sorenson's claims, cases such as *Healthcare Ass'n of New York*

State, Inc. v. Pataki, 471 F.3d 87 (2d Cir. 2006), to the extent they are relevant at all, actually support the Commission's position. Sorenson cites *Healthcare Ass'n* for the claim that "money 'earned from state … statutory reimbursement obligations' belongs to the service provider." Mot. at 9, *quoting Healthcare Ass'n*, 471 F.3d at 105. As an initial matter, that case involved a labor law question of whether a New York statute, which restricted employers from spending funds received from the state to hire employees or contractors to attempt to influence union organizing campaigns, was preempted by the National Labor Relations Act. The Second Circuit's discussion came in that context and did not involve any direct First Amendment analysis.

However, to the extent that *Healthcare Ass'n* has relevance here, it supports the Commission's orders. That decision said the relevant question in such cases is whether the policy "is aimed at making sure that State funds are only spent on the purposes the statute has chosen, or whether, instead, the State has used its spending power to restrict the associations' protected speech beyond their dealings with the state." 471 F.3d at 102. The FCC's action in the *Declaratory Rulings* here was precisely to ensure the TRS funds are spent for the statutory purpose of providing TRS services. The purpose of the restrictions the FCC imposed, as it said, was to ensure "'that these "public funds be spent for the purposes for which they were authorized."'"[9] The Commission expressly found that "using revenue from the TRS Fund or information obtained from end users in the provision of services supported by the TRS Fund, to engage in [lobbying or advocacy activities directed at TRS

[9] *2008 Declaratory Ruling*, 23 FCC Rcd at 8998 ¶11, *quoting United States v. American Library Ass'n*, 539 U.S. 194, 212 (2003) and *Rust*, 500 U.S. at 196.

users] is inconsistent with the purpose of the TRS Fund." *2008 Declaratory Ruling*, 23 FCC Rcd at 8998 ¶10.[10]

Sorenson's reliance (Mot. at 9-10) on the *dissenting* opinion in *Chamber of Commerce v. Lockyer*, 463 F.3d 1076 (9th Cir. 2006)(*en banc*), leads it to make the same mistake as the dissenting judge, who argued that the state statute at issue there "abrogates the First Amendment rights of employers to speak out and discuss union organizing campaigns." *Lockyer*, 463 F. 3d at 1098. As the *en banc* majority held, however, the dissent's view was "erroneous … [because] the California statute does not impose any condition on the *receipt* of state grant and program funds. Because an employer retains the freedom to raise and spend its own funds however it wishes – so long as it does not *use* state grant and program funds on union-related advocacy – [the state statute] does not infringe employers' First Amendment right to express whatever view they wish on organizing." *Lockyer*, 463 F.3d at 1096.[11] This is fully consistent with the FCC's statement in the *2008 Declaratory Ruling* that

> nothing we do here would prevent a provider from using information and funds from other sources to engage in lawful lobbying or advocacy activities. Thus, this is not an 'unconstitutional conditions' case in which the government "effectively prohibit[ed] the recipient from engaging in the protected conduct outside the scope of the federally

[10] It may be that an agency's attempt to place restrictions on how, for example, vendors that provide it with office supplies or similar goods may use the revenue from such sale or goods or service could raise constitutional or other issues. This is not that case. Sorenson's sole corporate purpose is to provide services that are reimbursed from a government-created fund created solely for that purpose and administered by the FCC. It is not an unconstitutional speech restriction for the FCC to take steps, as it did here, to ensure that reimbursements from that fund are spent on activities directly related to the purpose of the fund.

[11] The Ninth Circuit's decision was reversed and remanded by the Supreme Court solely on preemption grounds. The First Amendment issue was not before the Supreme Court, and the Court did not address the issue. *See Chamber of Commerce v. Brown*, 128 S.Ct. 2408 (2008).

> funded program." TRS providers are free to use those resources outside the scope of the TRS program to support their positions before the Commission.

2008 Declaratory Ruling, 23 FCC Rcd at 8998 ¶12, *quoting Rust*, 500 U.S. at 197.[12]

Nor does this Court's decision in *U S West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999) provide any support for Sorenson. It held there that "a restriction on speech tailored to a particular audience, 'targeted speech,' cannot be cured simply by the fact that a speaker can speak to a larger indiscriminate audience, 'broadcast speech.'" Here, the Commission has not restricted speech to a particular audience; it has restricted the use of information obtained because of participation in the TRS program and the use of funds received from the government-created TRS Fund. The *Declaratory Rulings* do not restrict Sorenson's right to speak to TRS users in any way or with respect to any subject so long as it does not use information and funds derived from its participation in the government-created TRS program. *See Rust*, 500 U.S. at 193 ("'[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.'" (quoting *Regan v. Taxation With Representation*, 461 U.S. 540, 549 (1983)).[13]

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[12] *See also Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 544-46 (1983) (holding tax exemption for non-profit groups that do not engage in lobbying did not violate First Amendment and noting that a group could qualify for the tax exemption by adopting a "dual structure," with one arm for non-lobbying activities and another for lobbying); *DKT Int'l, Inc. v. United States Agency for Int'l Development*, 477 F.3d 758 (D.C Cir. 2007) (rejecting First Amendment challenge to requirement that recipients of funds from AIDS/HIV education program adopt policy of opposition to prostitution and sexual trafficking, and noting that recipients could set up subsidiary to receive the funds and adopt the policy).

[13] Sorenson claims that the "invalidity of the present restrictions [on the use of customer information] follows *a fortiori* from *US West*," which the Commission "entirely ignore[d]." Mot. at 13-14. The Commission did not discuss the *U S West* decision because it has no application here. The customer information at issue here,

Sorenson claims that the FCC's reliance on a "purported need" to restrict use of customer information or TRS funds for purposes "'inconsistent with the purpose of the TRS Fund'" is "pretextual." Mot. at 10. Such an assertion is based in part on Sorenson's apparent misunderstanding of the TRS program's purpose, which is to provide disabled persons with "functionally equivalent" communications service rather than to facilitate Sorenson's communication of its own chosen message. The claim is also based on the fact that the Commission did not specifically highlight other examples of activities inconsistent with the purpose of the program. However, agencies need not address all problems "in one fell swoop." *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1207 (D.C.Cir. 1984). Moreover, "[a]s a general rule, the First Amendment does not require that the government regulate all aspects of a problem before it can make progress on any front." *Mainstream Marketing Services*, 358 F.3d at 1238.

The Commission adequately explained why it had concluded that customer data and TRS funds should be used by TRS providers only for purposes "directly related to the handling of TRS calls," and it reasonably noted an example of an activity (lobbying) that was not consistent with this purpose. *2008 Declaratory Ruling*, 23 FCC Rcd at 8997 ¶9; *see id.* at ¶¶9-13. Sorenson's motion fails to demonstrate that it was unreasonable for the FCC to state a general rule and provide

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unlike that in *U S West*, was developed solely in the context of Sorenson's participation in a government created and funded program. Nothing in *U S West* suggests that participants in such a program have a constitutional right to unrestricted use of such information and funds, as Sorenson appears to contend.

a specific example of activity that would run afoul of it.[14]

Finally, Sorenson's claim (Mot. at 14) that the restrictions set out in the *Declaratory Rulings* are unconstitutionally vague has no basis. It is clear to what the Commission was referring when it restricted use of customer information or TRS funds for "lobbying or advocacy activities directed at relay users." *2008 Declaratory Ruling*, 23 FCC Rcd at 8998 ¶10. Indeed, it gave an example of a complaint of a TRS provider that had "bombarded deaf persons with material seeking to persuade them to support the provider's position on matters pending before the FCC." *Id.* There is no basis for Sorenson's claim that persons of ordinary intelligence are unable to understand what conduct is not permitted. Moreover, parties are free to seek clarification as to specific conduct by requesting a declaratory ruling from the Commission. *See* 47 C.F.R. 1.2.

B. THE BALANCE OF EQUITIES DOES NOT SUPPORT A STAY IN THIS CASE.

For purposes of evaluating stay motions, the necessary showing on the merits is governed by the "balance of equities as revealed through examination of the other three factors" – irreparable injury, harm to others, and the public interest. *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d

[14] Sorenson also contends (Mot. at 12) that the rulings are unlawfully viewpoint-based because they "impose no limits on opponents of TRS services that are hostile to TRS providers," suggesting that there are only pro-TRS and anti-TRS viewpoints. This is not true. TRS providers often disagree on issues before the Commission relating to rates and other matters. *See, e.g. 2007 R & O and Declaratory Ruling*, 22 FCC Rcd at 20151 ¶¶16-20; *Telecommunications Relay Services*, 19 FCC Rcd 12475, 12558 ¶215 (2004). The *Declaratory Rulings* simply found that it is inappropriate for TRS funds to be used for any lobbying activity. That is not a viewpoint based restriction.

841, 844 (D.C. Cir. 1977). Where a petitioner, as here, has not demonstrated a significant likelihood of success on the merits, grant of a stay is appropriate only when the balance of hardships tips decidedly in petitioner's favor. *Id.* In this case, however, Sorenson's terse discussion of these considerations fails to demonstrate irreparable injury in the absence of a stay of the disputed portions of the *Declaratory Rulings*, and the public interest favors the Commission's determination that the restrictions imposed in these rulings are necessary to ensure that the subsidy for TRS goes to provide the services intended by Congress and not for other activities.

1. Irreparable Injury. A showing of irreparable injury is a critical element in justifying a request for stay of an agency order. *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Before Sorenson can obtain a stay, it must establish that the irreparable injury it would suffer without a stay would be "both certain and great," "actual and not theoretical." *Id.* at 674. In other words, Sorenson must provide "proof indicating that the harm [it alleges] *is certain to occur*." *Id.* (emphasis added). Sorenson's brief discussion of irreparable injury in its motion fails to satisfy this stringent standard.

Sorenson's showing of irreparable injury focuses on the claim that the new rules will deprive the company of its First Amendment rights. In support of this point, Sorenson makes the obligatory citation to cases that stand for the proposition that "'[d]eprivations of speech rights … presumptively constitute irreparable ham for purpose of a preliminary injunction.'" Mot at 18, *quoting Summum v. Pleasant Grove City*, 483 F.3d 1044, 1055-56 (10th Cir. 2007). However, contrary to what Sorenson appears to believe, the mere claim that an agency regulation will deprive a

party of First Amendment rights is not a basis for a finding of irreparable injury:

> A litigant must do more than merely *allege* the violation of First Amendment rights … the finding of irreparable injury cannot meaningfully be rested on a mere contention of a litigant, but depends on an appraisal of the validity, or at least the probable validity, of the legal premise underlying the claim of right in jeopardy of impairment.

Wagner v. Taylor, 836 F.2d 566, 576 n.76 (D.C. Cir. 1987) (internal quotations omitted). The Supreme Court has instructed that injunctive relief is not appropriate unless the party seeking it can demonstrate that "First Amendment interests [are] either threatened or in fact being impaired at the time relief [is] sought." *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976).

As we have shown above, there is no substantial basis for Sorenson's claim that its First Amendment rights are either threatened or impaired by the Commission's rulings here. Because the First Amendment claims are unavailing on their merits, Sorenson's effort to bootstrap those claims into a showing of irreparable injury is equally unsuccessful.

Sorenson claims (Mot. at 19) that it faces a "Hobson's choice" of self-censoring vital speech or risking a draconian FCC penalty. This is not a "Hobson's choice." It is at most a dilemma, but it is one created by Sorenson itself. The FCC's policy does not prohibit Sorenson from using non-TRS funds to advocate or lobby in favor of its desired policies or to use information other than the customer information it has obtained only as a result of its provision of TRS as the focus of its lobbying and advocacy efforts. That Sorenson apparently has chosen a business model in which its only revenues derive from the interstate TRS Fund is a voluntary choice it has made. It cannot use that voluntary business choice as a basis for its

claim of irreparable injury. And specifically with respect to the use of customer information, the Commission has repeatedly emphasized, at least since 2000, that use of such information other than for the provision of TRS is improper and would lead to denial of compensation from the TRS Fund. See pages 3-4 above. Sorenson's failure to challenge those prior rulings belies the company's current claim of irreparable injury.

2. Public Interest Considerations. "In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes." *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). The FCC has made a public interest determination in this proceeding, based on Congress' specific delegation of authority to it in 47 U.S.C. 225 to ensure that TRS "are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States," that restrictions on TRS providers' use of customer information and TRS funds are necessary to "prevent improper marketing practices and to ensure that interstate TRS funds are used for their intended purpose." *2008 Declaratory Ruling*, 23 FCC Rcd at 8996 ¶8. Staying the effectiveness of these restrictions, in light of the Commission's findings, would be detrimental to the public interest.

CONCLUSION

In consideration of the foregoing, the motion for stay should be denied.

Respectfully submitted,

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August 19, 2008

CERTIFICATE OF DIGITAL SUBMISSION

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/s/ C. Grey Pash, Jr.

C. Grey Pash, Jr.

August 19, 2008

CERTIFICATE OF SERVICE

I, C. Grey Pash, Jr., hereby certify that the foregoing "Opposition of Federal Communications Commission to Petitioner's Motion for Stay Pending Judicial Review" has been served, on August 19, 2008, by first-class mail and electronic mail, on the following persons at the addresses shown:

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